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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL LABRIOLA AND THOMAS CONTINO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
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v.
PAUL LABRIOLA AND THOMAS CONTINO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The oral opinion of the court of appeals (App. A, *infra*) is unreported. The opinion of the district court (App. D, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on November 10, 1977. A petition for rehearing was denied on January 12, 1978 (App. C, *infra*). On February 8, 1978, Mr. Justice Marshall

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extended the time for filing a petition for a writ of certiorari to and including March 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state officials, directing the production of a state prisoner for trial on federal criminal charges, constitutes a "detainer" or a "written request for temporary custody" making applicable the terms and conditions of Article IV of the Interstate Agreement on Detainers Act.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397–1402, 18 U.S.C. App., pp. 4475–4477, provides in pertinent part:

ARTICLE II

As used in this agreement:

(a) "State" shall mean a State of the United States; the United States of America * * *

* * * * *

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon

presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided,* That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further,* That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

* * * * *

ARTICLE V

(a) In response to a request made under * * * article IV, hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that

speedy and efficient prosecution may be had. * * *

* * * * *

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

* * * * *

STATEMENT

1. In September 1975, respondents and 12 others were charged in an indictment (75 CR 659) filed in the United States District Court for the Eastern District of New York with conspiracy to violate 18 U.S.C. 495 by forging and uttering United States Savings Bonds. On March 29, 1976, a superseding indictment (75 CR 659(S)) was filed, charging respondents and two others with 38 substantive violations of 18 U.S.C. 495.[1]

When the superseding indictment was returned, respondents were incarcerated at the New York City

[1] Following the filing of the superseding indictment, the original conspiracy indictment was dismissed with regard to respondents. Gov't App. A6. ("Gov't App." refers to the government's appendix in the court of appeals.)

House of Detention on Rikers Island, serving prison sentences on unrelated state charges.[2] Pursuant to separate writs of *habeas corpus ad prosequendum* issued by the United States District Court for the Eastern District of New York, respondents were transferred from state to federal custody and produced before the district court for arraignment on the superseding indictment (Gov't App. A38–A40; A42–A44). On March 30, 1976, after respondents had entered pleas of not guilty to the indictment, respondent Contino was returned to Rikers Island; respondent Labriola was retained in federal custody for one week, after which he was returned to state custody (Gov't App. A59–A60).

2. On April 29, 1976, respondents were produced for trial before the district court, again by means of writs of *habeas corpus ad prosequendum* (Gov't App. A41; A44–A47). Prior to the commencement of trial, respondents moved for dismissal of the indictment on the ground that they had been returned from federal to state custody without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on Detainers Act ("Agreement"). Article IV(e) provides for dismissal with prejudice of charges pending in a receiving state unless a prisoner obtained under the Agreement is tried before his return to the sending state.[3]

[2] Respondent Labriola was serving a sentence of four to eight years for robbery and respondent Contino was serving a six-month term for promoting gambling.

[3] Article IV(a) of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant serving a prison sentence in another member

At the initial hearing on the motions to dismiss, held on May 12, 1976, the district court and counsel for both sides discussed the fact that in *United States* v. *Mauro,* 414 F. Supp. 358 (E.D. N.Y.), affirmed, 544 F. 2d 588 (C.A. 2), certiorari granted, No. 76–1596, October 3, 1977 (argued February 27, 1978), a different judge in the same district had recently decided a similar motion against the government.[4] Counsel for

jurisdiction may lodge a "detainer" with the prison authority of that jurisdiction and, upon presentation of a "written request for temporary custody," obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (subject to continuances granted "for good cause shown in open court") and (b) prior to being returned to the sending state, or else the charges against him shall be dismissed with prejudice. Articles IV(c), IV(e) and V(c).

Article III of the Agreement further provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III, prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction, and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III (a), III(d), and V(c).

Both the United States and New York had become signatories to the Agreement prior to the relevant events in this case. Act of December 9, 1970, Sections 1–8, 84 Stat. 1397–1403, 18 U.S.C. App., pp. 4475–4478; N.Y. Crim. Proc. L. § 580.20 (McKinney 1971).

[4] Although the district judge's opinion in *Mauro* was not filed until May 17, 1976, the judge had orally granted the motions to dismiss on April 26, 1976, as to Mauro and on April 29, 1976, as to co-defendant Fusco.

respondent Contino expressed concern that if the district court denied respondents' motions (as he indicated that he would do (Gov't App. A66)), the ensuing lengthy trial "would have been for naught" in the event that the court of appeals ultimately affirmed the ruling in *Mauro* (Gov't App. A67). The court then suggested that if respondents were willing to waive their rights under the local speedy trial rules, their motions could be held in abeyance until after the decision of the court of appeals in *Mauro,* when the court "would know exactly whether or not you should continue or whether it should be dismissed" (Gov't App. A73). The government stated that it had no objection to this arrangement (*ibid.*), and respondents agreed to an adjournment of the trial until the court of appeals decided *Mauro* (Gov't App. A76–A77).

After the court of appeals affirmed the dismissal of the indictments in *Mauro* and denied the government's petition for rehearing *en banc,* the district court granted respondents' motions to dismiss the indictment (App. D, *infra*). The court of appeals affirmed the dismissal of the indictment on the basis of its decision in *Mauro* (App. A, *infra*).[5]

REASONS FOR GRANTING THE WRIT

The question presented in this case is identical to that presented in *United States* v. *Mauro,* No. 76–

[5] The court of appeals also agreed with the district court's additional holding—which we do not challenge in this petition—that the government was estopped in this case from arguing that the court of appeals' decision in *Mauro* should not be applied retroactively (App. A, *infra,* pp. 12–13).

1596, argued February 27, 1978. In this case, as in *Mauro,* prisoners serving state sentences were produced in federal district court on federal charges pursuant to writs of *habeas corpus ad prosequendum* and were returned to state prison without having been tried on the federal charges. The Second Circuit, relying upon its earlier decision in *Mauro,* held that under such circumstances the federal writ *ad prosequendum* constitutes a "detainer" and a "request for temporary custody" within the meaning of Article IV of the Agreement and that respondents' indictment must be dismissed with prejudice in accordance with Article IV(e) of the Agreement.

For the reasons expressed in our brief and upon the argument in *Mauro,*[*] we believe that Article IV of the Agreement is inapplicable to transfers of state prisoners by writs of *habeas corpus ad prosequendum,* particularly where, as here, no pre-existing detainer had been lodged against the prisoner. Should this court reverse the judgment of the court of appeals in *Mauro,* it should also reverse the judgment of the court of appeals in this case. Accordingly, we recommend that the Court hold the present petition pending its disposition of *United States* v. *Mauro, supra.*

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[*] We are sending respondents copies of our briefs in *Mauro* and *United States* v. *Ford*, No. 77-52, argued in tandem with *Mauro* on February 27, 1978.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States* v. *Mauro, supra.*

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
ELLIOTT SCHULDER,
Attorney.

MARCH 1978.

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APPENDIX A

United States Court of Appeals for the Second Circuit

(Docket No. 77–1315)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

PAUL LABRIOLA AND THOMAS CONTINO, ET AL., DEFENDANTS-APPELLEES

Before: Hon. IRVING R. KAUFMAN, *Chief Judge*, WILLIAM H. MULLIGAN, and J. JOSEPH SMITH, *Circuit Judges*. New York, November 10, 1977.

Statement made by the court at disposition of appeal in open court.

Judge KAUFMAN. Thank you. We are prepared to decide this case. We will affirm. This case has proceeded through the judicial process for over a year and has not reached the trial stage yet, largely as a result of the parties' attempt to obtain a definitive interpretation of the Interstate Agreement on Detainers. The question of the relevance of that agreement arose on May 4, 1976, when a motion was made to dismiss the indictments pending against the defendants. The substance of the motion was that § 4(e) of the agreement had been violated—both Labriola and Contino had been removed from state custody pursuant to a writ of habeas corpus ad prosequendum; arraigned on federal charges and then returned to state custody without being tried. Assuming that the federal writ constituted a detainer, for purposes of the interstate agreement, the indictment would then

have been prima facie invalid. During argument on this motion, however, it arose that Judge Bartels had just decided the case of *United States* v. *Mauro,* and he had concluded that the federal writ was encompassed by the agreement. Judge Costantino thus suggested that a lengthy trial in this case might be avoided by waiting for *Mauro* to reach the Court of Appeals, at which point he could decide the motion based upon the appellate court's reasoning.

Now the appellant—the defendants agreed to waive their speedy trial rights in order to permit this course of action. The government also expressed its willingness to comply with the suggestion. *Mauro* ultimately reached the Court of Appeals in October 1976 and in an opinion by Judge Mulligan, I should say in his usual scholarly opinion, concurred in by Judge Anderson, affirmed the district court holding. Nonetheless, Judge Costantino continued the stay in this case and waited until the petition for rehearing, en banc, of *Mauro*—which was denied.

Both sides in this case then submitted memoranda of law prior to the ultimate determination of the long-delayed motion, and the only argument raised in the government's papers was that *Mauro* should not be applied retroactively to transfers taking place prior to the date of the decision of the Court of Appeals. Eventually on June 28, 1977, Judge Costantino granted the motion to dismiss the indictments, holding that the government was estopped from raising the question of retroactivity. We agree—defendants in this case waived their speedy trial rights in order to allow the Court to obtain some guidance from the Court of Appeals opinion in *Mauro.* The government is now contending, in essence, that the Court of Appeals ruling is irrelevant. Having

acceded to the defendants' waivers, it should not be permitted to make such an argument, it seems to us. We reject, on similar grounds, its efforts to distinguish the defendants' cases from *Mauro* on factual grounds. While it has, at times, raised a factual distinction in Labriola's case, it has never developed the distinction in any legal argument. It shouldn't be permitted to do so at this late stage. With respect to Contino, it has never raised any factual distinction.

Finally, we are disinclined to delay our decision pending the Supreme Court's opinion in *Mauro.* We believe the defendants have waited long enough. Accordingly, we affirm the district court's dismissal of the indictments.

APPENDIX B

United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of November one thousand nine hundred and seventy-seven.

Present: Hon. IRVING R. KAUFMAN, *Chief Judge,* Hon. J. JOSEPH SMITH, Hon. WILLIAM H. MULLIGAN, *Circuit Judges.*

(77-1315)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PAUL LABRIOLA, JOSEPH MOGAVERO, THOMAS CONTINO, JAMES CONTINO, ROBERT NAPOLITANO, WILLIAM PALUMBO, FRANK MEMOLO, MARGARET SIERRA, MAY MAGLIONE, RICHARD SULLIVAN, ANTHONY PECORARA, JOHN DOE, A/K/A WALTER, TRUE NAME WALTER REMIND, JANE DOE, A/K/A JOYCE, TRUE NAME CONCETTA KENNEDY, DEFENDANTS. PAUL LABRIOLA AND THOMAS CONTINO, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By ARTHUR HELLER,
Deputy Clerk.

APPENDIX C

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of January, one thousand nine hundred and seventy-eight.

Present: Hon. IRVING R. KAUFMAN, Hon. WILLIAM H. MULLIGAN, Hon. J. JOSEPH SMITH, *Circuit Judges.*

(77–1315)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

PAUL LABRIOLA AND THOMAS CONTINO,
DEFENDANTS-APPELLEES

A petition for a rehearing having been filed herein by counsel for the appellant United States of America

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX D

United States District Court, Eastern District of New York

(75–CR–659)

THE UNITED STATES

v.

PAUL LABRIOLA AND THOMAS CONTINO, DEFENDANTS.

COSTANTINO, D. J.

MEMORANDUM AND ORDER

[Filed in Clerk's Office, U.S. District Court E.D. N.Y., June 28, 1977]

This is a motion by defendants Labriola and Contino to dismiss the indictment against them on the grounds that the government violated the Interstate Agreement on Detainers, 18 U.S.C. App. (Pub. L. 91–538, §§ 1–8, Dec. 9, 1970, 84 Stat. 1397–1403). There is no dispute that each defendant, while serving a state sentence, was brought into federal court by way of writ of habeas corpus ad prosequendum, then returned to state custody without being tried. The United States Court of Appeals for the Second Circuit, in *United States* v. *Mauro,* 544 F. 2d 588 (2d Cir. 1976) held that in such a situation, the federal indictment must be dismissed with prejudice.

The motions in this case were originally made in April and May, 1976. On May 12, 1976, the parties

requested that this court reserve decision on the motions until such time as the Court of Appeals decided *Mauro,* which was then pending. That decision was handed down on October 26, 1976. The government filed a petition with the Court of Appeals for rehearing *en banc,* and again requested that this court reserve decision on the within motions until that petition had been acted upon. Rehearing was denied by the Court of Appeals on March 15, 1977.

The government concedes that both Labriola and Contino fall within the factual ambit of *Mauro.* Nonetheless, it argues that the indictment in this case should not be dismissed because *Mauro* should not be applied retroactively. This court need not decide the retroactivity question, since it finds that the government is equitably estopped from raising the issue in the context of the present case.

It is apparent from a reading of the transcript of the May 12, 1976 oral argument that all parties understood that this court intended that the Court of Appeals' ruling in *Mauro* would be dispositive of these motions. That intention was made abundantly clear when the court, in acceding to the parties' request to reserve decision until the Court of Appeals decided *Mauro,* stated that by doing so "I would know exactly whether or not you should continue or whether it [the indictment] should be dismissed." (Tr., May 12, 1976, p. 13). The government stated that it had no objection to such a procedure, and it is now bound by that statement. *Cf. United States* v. *Alessi,* 536 F. 2d 978, 981 (2d Cir. 1976), cert. denied, —— U.S. ——, 97 S.Ct. 384 (1976).

In addition, the defendants consented on May 12, 1976 to waive their speedy trial rights pending a decision by the Court of Appeals in *Mauro.* That waiver

was predicated upon the understanding that the decision in *Mauro* would control the determination of the within motions (*see* Tr., May 12, 1976, pp. 16–17). The court agrees with defendant Contino that to allow the government to make its retroactivity argument after the lengthy delay involved in this case, particularly where the delay was for the specific purpose of awaiting the Court of Appeals decision in *Mauro,* would be unconscionable and would cast grave doubt on the validity of the defendants' waiver of their rights under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (*See* Defendant Contino's Memorandum of Law, pp. 5–6).

In light of the foregoing discussion, and without deciding the broad question of whether *Mauro* is to be applied retroactively, the court finds that *Mauro* must control the disposition of these motions. Accordingly, the indictment against defendants Labriola and Contino must be, and is, dismissed. Defendant Labriola's bail is hereby exonerated. So ordered.

MARK A. COSTANTINO,
U.S.D.J.

U.S. GOVERNMENT PRINTING OFFICE: 1978